No. 3427

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PABST BREWING COMPANY, a corporation,
Plaintiff In Error,

vs.

E. CLEMENS HORST COMPANY, a corporation,
Defendant In Error.

APPELLANT'S PETITION FOR REHEARING

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Appellant Petition for Rehearing

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the above named, The Pabst Brewing Company, the plaintiff in error, and hereby petitions the court for a rehearing of the errors which it seeks to review, and as ground for such relief alleges and shows:

This petition is filed because it appears from the opinion that the court has overlooked the fact that by the law of the case fixed by the former opinion, as well as by the well defined rule everywhere, the

market value at Milwaukee could not be inferred from the price at which a few sales were made at places remote therefrom.

It is the decision of this court that the plaintiff in error's contention that the trial court based its finding of fact as to market value upon wholly incompetent evidence which the previous decision in 229 Fed., 913, held should have been excluded upon the second trial, is refuted by the record. Three witnesses testified for the defendant in error on market value—Mr. Horst, Mr. George and Mr. Flint. None of them, as appears from the cross-examination, knew of any sales in Milwaukee at the time in question.

MR. HORST admitted at the time of testifying that he did not know the market. "I knew it at the time but I do not know it now." (R., p. 62.)

MR. GEORGE admitted that he knew of no sales in or about Milwaukee, nor did he know of any sales in Chicago. (R., pp. 96 and 97.) He was basing his opinion of value upon what he sold them at, (R., p. 97) and the sales made by him disclose that they were at places remote from Milwaukee.

MR. FLINT testified:—"I do not know of any that were sold at that time in Milwaukee. I did not sell any." (R., p. 273.) "Q. Have you any recollection of any sales of Cosumnes hops of purchases in the months of November and December, 1912? A. No, I have not them in mind now, I cannot recall them." (R., p. 274.)

Therefore the testimony of all of the witnesses for Horst on the matter of market value must have been merely an inference or guess, which at best could only have been based upon testimony of sales made at places remote from the Milwaukee market. Such evidence, the law of the case ordered should be excluded as incompetent upon which to base a market value in Milwaukee. This was particularly true because there was not only a market at Milwaukee but a market of large volume in Chicago, where market prices were shown by trade bulletins. The opinion evidence of these witnesses upon which this court now seems to rely is nothing but an attempt on the part of the witnesses to pursue a course of reasoning—to draw an inference—which was forbidden to the trial court by the former decision. The legitimacy of an inference as to the Milwaukee market predicated upon sales at the Atlantic coast is negatived as a matter of law, by the previous decision. Surely that which was not evidence before cannot become evidence now merely because witnesses have taken the witness stand to pursue a course of reasoning which was forbidden to the lower court by the former decision.

Unless the former decision and the fundamental rules of law upon which it is based are disregarded, there is no conflicting evidence to be weighed. A witness' statement as to value, if based upon an improper method of valuation, does not raise a conflict or put in issue the testimony of another witness based upon a method of valuation sanctioned by law.

In *Batavian Bank* v. *North,* 114 Wis., 637, 90 N. W., 1016, the first headnote is as follows:

> "Opinion evidence as to an ultimate fact, based on a correct theory of the underlying facts, met by like evidence upon a wrong theory of such minor facts, does not create a conflict for solution by a jury."

In *State* v. *Williams,* 123 Wis., 61, 68, 100 N. W., 1048, the court said:

> "It is said that the evidence on relator's side was consistent with the statutory basis for valuing the property, while that in support of the assessor's valuation was on an illegitimate basis. *True,* as counsel claims, *in such circumstances there is no conflict and the evidence on the side supporting the correct theory should be regarded as the sole evidence to base a decision on."*

In the case of *Winslow* v. *Glendale Light & Power Co.,* 130 Pac. Rep., p. 427, the California Court held: (quoting from syllabus)

> "In an action against a light and power company for personal injuries, defended on the ground that the accident occurred through the negligence of an independent contractor, the conclusion of a witness, improperly admitted as competent, that he was employed by defendant, when in fact he was employed and paid by the contractor and knew nothing of any arrangement of his employer with defendant, and thought that his employer was merely defendant's foreman, as against uncontroverted evidence that his employer was an indepen-

dent contractor raised no conflict in the evidence as to the relations of the parties."

And in an Alabama case, the Supreme Court of that State decided (quoting from syllabus):

> "Where a witness states an opinion or conclusion which is irreconcilably opposed to the stated facts upon which it is founded, the opinion or conclusion is of no weight and raises no conflict with the stated facts."

Hicks v. *Burgess,* 64 So., 290-1.

In *Rogers* v. *Village of Orion,* 74 N. W., 463, the Michigan Court held (quoting from syllabus):

> "The opinion of a witness that a sidewalk was rebuilt because it required rebuilding is incompetent, where it was rebuilt by a railroad company whose employees testified it was rebuilt because of a change of grade."

Jones on Evidence (2nd Ed.), Sec. 371, says:

> "If the foundation for the evidence is removed there is of course no basis for the super-structure."

Following the reasoning in the above cases, if such opinion evidence so erroneously based upon an insufficient premise does not raise a conflict with opinion evidence formed upon a correct hypothesis then surely ill-advised opinion evidence cannot raise a conflict with evidence of the ultimate fact proven by direct testimony. In other words, it is our contention that

the opinion evidence of market value by the witnesses referred to does not raise a conflict with the market prices—the ultimate fact to be established proven by showing the actual transactions that took place in Milwaukee in hops of the character in issue and which were corroborated by the actual transactions shown to have taken place in Chicago, the next nearest available market to the one determined by the law of the case to be the criterion from which the defendant in error should measure his damages.

Market Value

> "Market value is not an imaginary fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question."
>
> *Birdsong & Co.* v. *Marty,* 163 Wis., 516, 524.
>
> "Market value at any given time is fixed by sales made at or about that time."
>
> *Carley* v. *Nelson,* 145 Wis., 543.

According to judicial definition, market value is the price obtained for a given commodity in the ordinary course of business—that price reflected by actual transactions resulting from the closing of negotiations between a person willing to sell but not required to do so, and a person desirous of buying but not forced to do so. In other words, the fundamental test of market value is the price realized on

actual sales. The fallacy of opinion evidence as to the market price of a given commodity not based upon the price at which actual sales take place, is best illustrated in referring to a commodity for which there are regular market exchanges recording each such transaction. To permit a witness having no knowledge of these actual transactions to venture a guess as to the market value of that commodity at a particular time in a certain market would reduce to an absurdity the principle upon which market value shall be established. Mr. Justice Mitchell of Pennsylvania in *Dawson* v. *Pittsburgh,* 159 Pa., 317, 28 At. 171, thus expressed himself on this subject:

> "It is a matter of opinion at best and the lowest grade of evidence that ever comes into a court of justice. *It is permissible only because bad as it is, there is nothing better obtainable. . . .*"

Here the ultimate fact to be established—the price at which sales were being made in the ordinary course of business—was proven by direct testimony in the Milwaukee market and which was confirmed in toto by evidence of the sales of large quantities in the Chicago market. (R., pp. 171, 172 and 200.)

> "Reasoning is a proper function of a judge, jury and counsel. It is not part of the normal proof of a witness. He is to state facts rather than opinions. Where a fact is susceptible of proof by direct evidence, opinion evidence is properly excluded."

17 *Cyc. of Law,* page 25.

So it was held in *Federal Insurance Company* v. *Munden,* (Tex.) 203 S. W., 917:

> "The facts upon which the witness based a conclusion and not his conclusion upon undisclosed facts is the standard, since to admit his conclusion or inference from the facts is but to determine the given issue upon the reasoning of the witness, while the rule is for the witness to give the facts and leave to the judge or jury the function of reasoning from the facts furnished. Such it seems to us, is basically correct."

We therefore restate that the opinions of all of the Horst witnesses who testified to market value at Milwaukee, if there was any foundation for their conclusions, must have been based upon sales at remote points from the place in issue and which this court had held in its previous decision to be improper upon which to determine the market price at Milwaukee. It is a well established rule in all jurisdictions that testimony based upon a hypothetical question which is faulty by reason of the inclusion of an impertinent, or the omission of a pertinent fact, raises no conflict with other testimony predicated upon a hypothetical question containing all the vital facts.

THE FACT THAT AFTER THE WITNESSES CALLED BY THE DEFENDANT IN ERROR HAD TESTIFIED ON DIRECT EXAMINATION TO MARKET VALUE AT MILWAUKEE, WERE CROSS-EXAMINED, AND IT WAS DEMONSTRATED

ON SUCH CROSS-EXAMINATION THAT THEIR INFERENCES WERE BASED UPON SALES AT PLACES REMOTE FROM MILWAUKEE, DOES NOT WAIVE THE RIGHT OF THE PLAINTIFF IN ERROR TO ASSERT THAT SUCH OPINION EVIDENCE IS A NULLITY BECAUSE BASED UPON AN IMPROPER PREMISE.

When we cross-examined these witnesses for this purpose it was to show that their statements were not evidence; that when proper rules of law were applied, their testimony raised no conflict with the testimony of the witnesses of the plaintiff in error and the documentary evidence showing both the Milwaukee and the Chicago markets. By the present decision the Court, in effect, holds that we should have anticipated, when we demonstrated that the statements of value made by the defendant's witnesses were on an illegitimate basis, that the trial court would disregard the previous decision of the Court of Appeals and by applying erroneous rules of law fix a market value at Milwaukee from facts having no probative force and no value as evidence under the former decision. This process does not involve the function of weighing evidence. In order to weigh evidence there must be some evidence on each side of an issue. The testimony of the plaintiff's witnesses is of no probative force or evidentiary value whatever if the rule of damages prescribed by the former opinion is to be applied. The witnesses merely attempted to do what the court was forbidden to do. A process of reasoning which, as a

matter of law, leads to a *non sequitur* when indulged in by a court must have the same effect when indulged in by a witness.

When, by cross-examination, we demonstrated that the testimony of the witnesses, Horst, George and Flint, furnished no information upon which market value could be predicated if the rule of the former opinion were applied and that such testimony dealt entirely with a matter of valuation erroneous, as a matter of law, the testimony thereby outlawed itself and became of no probative force or evidentary value.

Jones on Evidence (2nd Ed.), sec. 895.

Surely when, by cross-examination, we demonstrated that the testimony of these witnesses could not be helpful or material in ascertaining market value under the rules of law we did not thereby consent that the trial court might turn its back upon the rules of law and apply any illegitimate method of valuation which would fit into and make pertinent the testimony of these witnesses.

The situation is exactly analogous to a case where a party testifies to an oral agreement made with another party but fails to give the date, and upon cross-examination it is developed that the agreement dealt with exactly the same subject-matter as a written contract and the agreement was made prior to the written contract. The result of such cross-examination would be that when plain rules of law were applied the alleged oral agreement would have no effect be-

cause, as a matter of law, it would be merged in the written contract; yet, under the present decision of this court consistency would require that in such a case it be held that the cross-examination showing the subject-matter of the oral agreement and that it preceded the written agreement in point of time, was, in effect, a waiver by the party so cross-examining, of the application of rules of law, and a consent that the trial court might abandon the rule which would hold the verbal arrangement to be of no consequence because merged in the written agreement.

All that has happened here is that the witnesses have overruled the previous decision of this court. It seemed to us entirely sufficient to establish, by cross-examination, that the testimony of the witnesses, Horst, George and Flint, amounted only to the drawing of the inference which this court previously said could not be drawn. The present opinion, however, recognizes the right of the witnesses to overrule the previous decision, to change rules of logic and of law and give evidentiary value to testimony which, by well recognized rules of law and by the former decision of this court is without evidentiary value and relates solely to immaterial matters when the proper test of market value is applied.

In *Brockman Com. Co.* vs. *Aaron,* (Mo.) 130 S. W., 116, the court held:

> "It is within the province of appellate courts to ascertain whether testimony has any evidentiary

strength, and if found to be impotent, to cast it aside as though it had not been given."

We submit that if this court adheres to its former decision in this case, it must be held that the opinion evidence of the Horst Company witnesses is impotent and does not create a conflict with the proofs of plaintiff in error of actual sales at Milwaukee which was direct evidence tending to prove the ultimate fact, to-wit: the market value at Milwaukee of hops of the character in issue on November 4th, 1912, or soon thereafter, which was the time and place fixed as the criterion upon which the defendant in error was to measure the loss, if any, that it has sustained by the alleged breach of contract.

AS TO DENIAL OF MOTION TO STRIKE OUT TESTIMONY OF WITNESS HORST AS TO NUMBER OF BALES ON HAND ON NOVEMBER 4TH BECAUSE NOT BEST EVIDENCE.

We respectfully submit that this Court has inadvertently omitted to rule upon assignment of error No. 52 (p. 259 Record) which was specifically urged in our oral argument, namely, that the lower court erred in refusing to strike out witness Horst's testimony that the Horst Company had 2000 bales available for delivery to Pabst Brewing Company when on cross-examination he admitted that his testimony was based on reading over his record at the former trial, which testimony was based on the books of Horst Company not in evidence. His testimony to that effect on direct

examination was that he remembered that they had on November 4th, 1912 something over 3000 bales (R. P. 46). On cross-examination, the witness testified (at p. 80) that his testimony at the second trial was based upon reading over his testimony at the former trial. The witness admitted that at the former trial he was compelled to go to the Horst Company's books to get the exact figures but claimed that, in a general way, he knew the figures without the books. The record shows that the books were not introduced in evidence.

Pabst Company then moved to strike the testimony out on the ground that it was not the best evidence (pp. 78 and 81). This was denied and excepted to.

Similar testimony of the same witness with reference to the number of bales on hand appears at various places throughout the record of Mr. Horst's testimony.

There is no other evidence of the number of bales Horst Company had on hand on November 4th, 1912 except a statement prepared by Horst at the former trial showing 1503 bales (p. 74).

This court bases its present decision on the testimony that some 1500 bales of the hops were on the Pacific Coast, that 400 were in Milwaukee, 600 bales in New York and 500 to 600 bales in transit, and that Horst Company retained control of the hops while in the Eastern States prior to November 4th, 1912. But this testimony was admitted by Mr. Horst to be his memory of what his former testimony was as shown by the record of the former trial.

This was one of the many forms in which Mr. Horst testified he remembered these facts as to the whereabouts, condition of sales and right to transship hops, but the record conclusively proves that he based this testimony upon his memory of the entries in Horst Company's books.

Judge Rudkin on the former trial (229 Fed. p. 918) held there was not the slightest testimony as to how these books were kept, and that evidence based thereon was hearsay.

These books were not introduced in evidence at either trial.

This procedure here under discussion practically forced Pabst Company to accept the testimony of the memory of the President, manager and principal owner of Horst Company as to the contents of the books as the facts without a chance to cross-examine with reference to the same.

Pabst Company never have been given an opportunity to cross-examine any witness who made any entry in these books, in any way either as to the manner and character of so-called sales, nor to the actual number of bales on hand as shown by these books or otherwise.

The introduction of extracts from the books without introducing the books was held error by Judge Rudkin at the first trial (p. 918).

Certainly this defect in manner of introducing contents of their books cannot be remedied by the simple expedient of having Mr. Horst testify that he remem-

bered the facts as to the whereabouts and condition of the sales of 3062 bales when his testimony on cross-examination shows he had no independent memory thereof and based his testimony on reading his former testimony based on these books.

> In fact, he testified "I don't know whereabouts they were in Chicago or in New York or where they were stored in Milwaukee, but I can find out" (R. p. 57). "I can't tell you off hand. They were in the warehouse and on the railroad tracks. We have got a record of it and I will furnish the record. My recollection is that there were only 1300 bales on the Coast. I will find out" (R., p. 57).

and again

> "There were about 1300 or 1400 or 1500 bales on the Coast" (p. 79).
>
> Q. "Are you testifying from a memory of those facts or from records you have?" (p. 80).
>
> A. "Well for those particular figures that I am giving now I read over the testimony that I gave on the former trial."
>
> Q. "That testimony is based upon figures that were based upon your books, is it not?
>
> A. "Of course at that time, when I gave the testimony before, then I knew the figures; thence the situation was comparatively new, but now I base my present statement upon reading the testimony on the former trial."
>
> Q. "At the former trial didn't you testify you had to go to your books in order to get that information?"
>
> A. "I had to go to my books to get exact figures but in a general way I knew the figures without the books. I knew them at that time" (p. 80).

Certainly there could be no more complete admission that his testimony on the number of bales, their position and the condition under which they were held, was hearsay.

The witness was not the person who made the entries in the books nor did he keep the record of the former trial.

His testimony would not have been admissible evidence on direct examination if it had been accompanied by his subsequent explanation. Counsel for Pabst Company made their motion to strike out immediately upon the evidence showing the real basis of the testimony on direct examination, viz.: On cross-examination. It could not act before the facts were in evidence. It was the orderly method of procedure.

The Alabama Court has held (quoting from syllabus):

> "A witness on direct examination testified to a fact. On cross-examination it was shown that the only way he knew anything about the fact testified to was that somebody had told him about it. The cross examiner thereupon moved the Court to exclude the testimony of the witness as hearsay. Held that as the cross-examiner had availed himself of the first opportunity to have the evidence excluded the motion should have been sustained."

Theodores Land Co. v. *Lyon* (41 So., 682).

That the use of such so-called refreshing of a witness' memory is not proper method of introducing

evidence was held by *F. Dohmen Co.* v. *Niagara Fire Ins. Co.,* 96 Wis. 38, the Court saying:

> "The most that can be said is that he had a general familiarity with the business as it was transacted. *There is nothing to show that an inspection of the books refreshed his memory and recalled previous actual knowledge of such transaction.*"

In *Chicago Lbr. Co.* v. *Hewitt et al.* 64 Fed., 314-6, Lurton, Justice, said:

> "But it is equally true that the date upon which these entries had been made had been obtained from another, and that the witness had no such personal knowledge as to the correctness of these data as to enable him to say anything more than that he had correctly recorded the results obtained from data furnished by another."

Witness Horst himself supplied a compilation of the number of Horst grown hops sold after November 4th, 1912, which appears in full at pages 72 to 74 of the record—giving a gross total of 1711 bales which when reduced by bales used for other purposes (Claims 37 Cut up 2 Delivered on pickouts 169) shows the total number on hand on November 4th, 1912, capable of delivery to Pabst Company as 1503.

Even though Horst Company continued in control of the hops in the Eastern States they could not have delivered them to Pabst Company without occasioning a loss to themselves. The record shows that other

than the 1503 bales accounted for by Mr. Horst's testimony as having been sold after November 4, 1912. There were but two classes left—one consisting of 497 bales which Mr. Horst testified "were used on sales that we made prior to November" (p. 68) and delivered at an average price of 17 cents per pound (p. 69), and another class of 1062 bales delivered on former contracts—that were sold at prices "in excess of 20 cents per pound" (p. 86).

Certainly, therefore, if these bales were used for delivery to Pabst Company when the findings are that hops were 16 cents per pound in Milwaukee it would require the testimony of some one familiar with the facts, when the entries were made in the books to ascertain where the hops were stored, whether the hops were available for sale after November 4, 1912, at 16 cents per pound, and how much the freight charges from the place of storage to Milwaukee was, in order to ascertain how much their sale affected the item of damages in the findings.

Mr. Horst testified he did not know where they were stored (supra).

It must appear that the defendant in error could have introduced the witnesses who made the entries in the books and could have proven the number of bales Horst Company had on hand on November 4th, 1912 by his books if properly introduced. Consequently, there was no reason shown why secondary evidence should have been introduced.

Had the books been introduced properly the Pabst Company's Counsel could have cross-examined as to the terms and conditions of delivery. They were foreclosed from doing so by Mr. Horst testifying from his memory of the record at the former trial.

This Court at the former trial held (p. 918):

> "The books themselves afforded the primary evidence of their contents and as long as they were accessible and unaccounted for, any evidence as to what they contained or showed was secondary and incompetent. * * * Furthermore the books were not identified or proved so as to render them competent if offered, * * * there was not the slightest testimony as to how the books were kept, when the entries were made or the sources from which they were made."

Under an almost identical state of facts, the Georgia court held that an attempt to refresh testimony in a similar manner was inadmissible in the following language:

> "The plaintiff in this case, though its name would indicate it was either a corporation or a partnership, really consisted of but one natural person,—Linton Sparks. Having failed in every other way to make out his case, he offered himself as a witness, and undertook to testify from his own personal knowledge to the delivery of certain car loads of ore to the railway company. Although he testified, in general terms, that he remembered the numbers by which these cars were identified, their destinations, and the dates of their shipment

to be as stated by him on the stand, and that he used certain books and memoranda to refresh his memory, it is apparent he did not in fact have any definite or distinct recollection concerning the matters about which he spoke. He admitted on cross-examination that without the memoranda 'he could not remember numbers, dates, or destinations of any particular car.' The books which he stated he used to refresh his memory were not before him while testifying, and he relied solely upon memoranda taken therefrom. It further appeared from his testimony that the entries in the books were sometimes made by himself, and sometimes by another in his employ, and he was unable to state which entries had been made by himself, and which by the other. It is therefore manifest that, deprived of his memoranda, the witness would have been utterly unable to state anything definite concerning the alleged shipment of the cars, and that his professed recollection of the transaction really amounted to nothing. He was simply undertaking to swear to the correctness of information he himself had derived solely by consulting certain books, and copying extracts therefrom. Of the reliability of the books themselves there was no proof whatsoever. If the entries in the books had all been made by himself, and he had sworn to their correctness, and had stated that he had, at the time such entries were made by him, personal knowledge of the matters in question, his testimony would have been admissible. It appearing from his own testimony, however, that some of these entries were made by another person, and he not undertaking to distinguish those entries from others made by himself, or to state that he had ever had any personal knowledge of the matters to which they related, his testimony can only be

characterized as being, to a greater or less extent, mere hearsay, and utterly unreliable. No reason appears why the books themselves, together with proper proof of their correctness, were not produced. Had this been done the witness might at least have verified the correctness of his statements based on entries made by himself, and thus have given some force to the assertion that his memory had thereby been refreshed. We think that his testimony, in the manner in which it was presented, was clearly inadmissible, and that the court properly rejected the same.

Hermatite Mining Co. vs. *East Tennessee,* 18 S. E. 24-25.

We respectfully submit that the trial Court erred in not striking out the testimony of witness Horst as to the number of bales available on November 4th, 1912 when on cross-examination it appeared that this was not the best evidence (p. 79).

Dated May ~~23rd~~ 16th, 1920.

Respectfully submitted,

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Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys and counsel for appellants and petitioners in the above

entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated: San Francisco, May ~~24th~~ 26th, 1920.

FRANK H. POWERS,
One of the attorneys and Counsel
for Appellants and Petitioners.